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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

J.A. JONES MANAGEMENT SERVICES, INC. T/A JONES MANAGEMENT SERVICES, INC. AND VASPOLI CUSTOM BUILDERS, INC. T/A VASPOLI CUSTOM BUILDERS,

Petitioners

v.

MARK ROMA, AND HIS WIFE, MELANIE ROMA

Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARK ROMA, et al.,	:	
	:	CIVIL ACTION NO. 99-
Plaintiffs,	:	5080(MLC)
	:	
v.	:	**MEMORANDUM & ORDER AND ORDER**
	:	
UNITED STATES OF AMERICA, et al.,	:	**TO SHOW CAUSE**
	:	
Defendants.	:	
	:	

COOPER, District Judge

This matter comes before the court on three motions for summary judgment by various defendants ("Moving Defendants") as to the claims of plaintiffs Mark Roma ("Mark Roma") and his wife Melanie Roma ("Melanie Roma") (collectively "Plaintiffs"). The first motion is made by defendants United States of America ("United States"), United States Department of the Navy

("Department of the Navy"), and Naval Firefighter Captain John Doe ("Naval Firefighter Captain John Doe") (collectively "Federal Defendants"). Federal Defendants seek summary judgment on the grounds of: (1) lack of subject matter jurisdiction over Melanie Roma's loss of consortium claim and Mark Roma's claim of negligence in starting or failing to prevent the fire, due to failure to exhaust administrative remedies under the Federal Tort Claims Act; (2) application of the New Jersey "Fireman's Rule;" and (3) the exclusive nature of Mark Roma's remedy under New Jersey's workers' compensation law. The second motion and third motion, by defendants Vaspoli Custom Builders, Inc. t/a Vaspoli Custom Builders ("Vaspoli") and J.A. Jones Management Services t/a Jones Management Services ("Jones"), are based on the statutory immunity created by the Fireman's Rule. This Court will grant these motions in their entirety

and all claims asserted by Mark Roma and Melanie Roma against Moving Defendants, as well as any John Doe defendants who were federal employees, will be dismissed with prejudice. Furthermore, this Court will order the parties to show cause why any remaining claims in the first-party action, claims in the third-party actions, and cross claims should not be dismissed in their entirety as moot, thereby closing this case.

BACKGROUND

On or about November 24, 1997, Mark Roma, a volunteer firefighter for the East Dover Volunteer Fire Department, was allegedly injured by smoke inhalation suffered while fighting a fire at the Lakehurst Naval Air Engineering Station ("NAES"). (Am. Compl. II ¶¶ 1-11.)

Pursuant to a Mutual Aid Agreement, the NAES summoned the East Dover Volunteer Fire Department,[1] located outside of the NAES district, to assist in quelling a fire that had broken out on the roof of Hangar No. 1.[2] (Strasser Decl. at ¶ 8.)

Hangar No. 1 was undergoing improvements to its roof drainage system at the time of the fire. (Decl. of J. Andrew Ruymann dated 2-22-02 ("Ruymann Decl.") Ex. 5: Dep. of Steven J. Vaspoli dated 6-22-01 (Vaspoli Dep.") at 84.) The drainage work was part of a larger contract assigned to Jones as general contractor for the project. (Fed. Defs.' Material Facts ¶26.) Jones subcontracted the work on the roof to Vaspoli. (See

[1]. Approximately 19 fire companies responded to the call for mutual aid. (Federal Defts.' Statement of Material Facts in Supp. of Mot. for Summ. J. ("Fed. Defs.' Material Facts") ¶ 7; Decl. of Richard Strasser dated 2-22-02 ("Strasser Decl.") ¶ 10.)

[2]. Hangar No. 1 is a national historic monument that once housed the *Hindenburg*. (Strasser Decl. ¶ 7.)

generally. Ruymann Decl. Ex. V-9: Contract between Jones and Vaspoli dated 6-22-01.) The fire began when Vaspoli was removing the hangar's metal roof with a spark-producing "chop saw." (Vaspoli Dep. at 84.) The hangar had two roofs, namely the metal roof undergoing the drainage updates and a wooden sub-roof below it. Vaspoli, in the course of the drainage work, discovered debris between these two roofs consisting of industrial garbage bags, filled with cardboard, paper, and miscellaneous construction scraps. (Id. at 50.) It was determined before the outbreak of the fire that this debris had been left behind by a contractor who had worked on the roofs approximately ten years earlier.[3] (Id.) Vaspoli, who had been working on the roof for approximately

[3] Boxes of debris were marked with the name of defendant Wigand and Sons. Wigand and Sons cannot be located, has not been served, and is presumed to no longer be in existence. (Pls. Br. in Opp'n. to Fed. Defts.' Mot. ("Pls.' Br.") at 22.)

eight weeks before the fire, reported that the debris was spread intermittently throughout the roof of the hangar, making it hard to predict whether there was any debris under the daily worksite.[4] (Id. at 136-40.) The sparks from the chop saw ignited some of the debris, resulting in a fire between the roof and the sub-roof. (Id.)

The East Dover Volunteer Fire Department responded to the call for mutual aid by dispatching a fire truck and approximately seven firefighters, including Mark Roma. (Ruymann Decl. Ex. 1: Dep. of Mark Roma dated 9-14-01 ("Roma Dep.") at 75.) The East Dover Volunteer Fire Department set up post at NAES Station 63, where the highest-ranking officer on the truck, Lieutenant Chris Chlebowski ("Chlebowski"), received instructions from

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[4]. Hangar No. 1 is one of the largest structures on the base, measuring approximately 960 ft. long, 350 ft. wide, and over 220 ft. high. (Strasser Decl. ¶ 7.)

NAES officers as to where the East Dover firefighters would be most needed. (Id. at 76.) Chlebowski told three of his men, including Mark Roma, to report to the NAES Captain, and render assistance. (Id. at 77.) The NAES Captain directed the men to assist in covering flight simulators with tarps. (Id. at 78.) The East Dover firefighters, after completing this task, were ordered back to their truck. Unidentified NAES officers stopped these firefighters, and they asked the East Dover firefighters to go to their truck and gather equipment, including saws and SCBA units,[5] and then report to the hangar roof. (Id. at 81, 83.) The East Dover firefighters went to their truck and informed Chlebowski of the request for assistance on the roof of the hangar. (Id. at 82.) Chlebowski told them to report to the roof and to "follow orders" once they arrived. (Id.) The East Dover firefighters grabbed their

[5] A SCBA unit is a breathing apparatus.

equipment and proceeded to the hangar elevator. (Id. at 86.) They went to the roof together with a NAES firefighter who was running the elevator. (Id.) A NAES officer, stationed in front of the elevator door, instructed the East Dover firefighters to leave the SCBA units near the elevator because this equipment was not needed. (Id. at 87.) A pile of such SCBA units had already been formed prior to their arrival on the roof. (Id. at 88.) Mark Roma testified in his deposition that he questioned the NAES officer regarding this order to leave behind his SCBA unit. (Id. at 89.) He stated that, despite his concern, he followed the instruction because the size of the pile indicated that the other firefighters currently on the roof also complied. (Id. at 87-90.)

Mark Roma began to assist in passing tools down a line of firefighters. (Id. at 96.) While in the passing line, a

NAES firefighter asked him to relieve a firefighter who was aiming a fire hose down a hole in the metal roof. (Id. at 98-99.) Mark Roma complied with this request. (Id.) He testified that shortly before he was relieved from this station, white steam-like smoke began to come out of the metal roof's hole and towards him, lasting a couple of minutes. (Id. at 101-02.) Mark Roma, upon being relieved, picked up his SCBA unit, proceeded down the elevator, and reported to the rehabilitation location. (Id. at 111-12.) The East Dover Volunteer Fire Department was then released from the scene. (Id. at 121.)

Mark Roma started to cough on the trip back to the firehouse. (Id. at 122.) He began to cough up blood after he arrived at the firehouse. (Id. at 123.) A first aid squad was summoned and transported him to the Community Medical Center where he was kept overnight for

observation. (Id. at 123, 126.) Mark Roma alleges that, since the fire, he has suffered from wheezing, hemolysis, chemical bronchitis, smoke inhalation, coughing up blood, severe chest irritation and discomfort, pulmonary problems, gastritis, hiatal hernia, shortness of breath, headaches, vomiting, restriction and irritation of the airway, and permanent damage to his lungs and lung function. (Second Am. Compl. at 6.)

Mark Roma filed an administrative claim, as required under the FTCA, alleging negligence on the part of Federal Defendants in instructing him to remove his breathing apparatus and asserting that his injuries resulted from this instruction. (Decl. of William M. Sexton dated 2-26-02 ("Sexton Decl.") Ex. C2: Standard Form 95 filed by Stephen M. Tatonetti on behalf of his client Mark

Roma dated 4-9-98 ("SF 95")) The United States denied his claim on July 22, 1999. (Sexton Decl. ¶ 6.)

Plaintiffs filed a Complaint with this Court on October 27, 1999. The initial Complaint names as defendants: (1) the United States; (2) the Department of the Navy; (3) the Naval Firefighter Captain; (4) Contractor John Does (1-10); (5) Fire Chief John Doe; (6) Battalion Chief John Doe; (7) John Does (1-10); and (8) John Doe Entities (1-10). (Compl. at 1.) The Magistrate Judge, in an Order filed on October 6, 2000, permitted Plaintiffs to file an amended complaint substituting additional named defendants for certain fictitious defendants. (Order filed 10-6-00.) This Amended Complaint, adding Jones and Vaspoli as defendants, was filed on October 30, 2000. (Am. Compl. at 1.) On January 19, 2001, the Magistrate Judge granted Plaintiffs leave to file another amended

complaint naming Wigand as a defendant in place of Contractor John Doe 2. (Order 1-19-01.)

Plaintiffs filed their Second Amended Complaint, naming Wigand as a defendant, on January 19, 2001. The Second Amended Complaint contains thirteen separate counts. (See generally Second Am. Compl.) Mark Roma essentially alleges that Moving Defendants, with the exception of the Naval Firefighter Captain, negligently and recklessly caused or failed to prevent the NAES fire. (See generally id.) He also claims that the Federal Defendants negligently or recklessly provided him with improper supervision and instructions. (See generally id.). Melanie Roma states a loss of consortium claim in Count Twelve. (Id. Count Twelve.) Count Thirteen seeks information under the Freedom of

Information Act ("FOIA"), 5 U.S.C. § 552. (Id. Count Thirteen.)

On February 16, 2001, Vaspoli filed an Answer to this Second Amended Complaint that included cross-claims for contribution and common law indemnification. (Answer filed 2-16-01.) The United States, Department of the Navy, and Naval Firefighter Captain filed their Answer, also asserting contribution and indemnification cross claims, on March 2, 2001. (Answer filed 3-2-01.) Vaspoli then submitted a Third-Party Complaint, alleging claims against third-party defendants William Green d/b/a Green Carpentry and Green Carpentry, Inc., which was filed on March 27, 2001. (Third-Party Complaint filed 3-27-01.) Jones filed an Answer to the Second Amended Complaint on April 5, 2001. (Answer filed 4-5-01.) This Answer included cross claims for contribution,

contractual indemnification, breach of contract, and common law indemnification as well as third-party claims against third-party defendant, Harleysville Insurance Company, t/a Harleysville Insurance of New Jersey ("Harleysville"). (Id.) On June 22, 2001, Harleysville filed an Answer to Jones's third-party claims. (Answer filed 6-22-01.)

Vaspoli filed its initial summary judgment motion on August 8, 2001. (Notice of Mot. filed 8-8-01.) Jones filed an identical motion for summary judgment on August 8, 2001. (Notice of Mot. filed 8-8-01.) The Court heard oral argument regarding these motions on September 4, 2001. On October 10, 2001, this Court entered an Order denying Vaspoli and Jones's motions for summary judgment without prejudice. (Order filed 10-10-01.) The Court denied these motions in order to

allow for the completion of discovery. (Id.) A Scheduling Order filed on December 4, 2001 indicated that discovery was to conclude on December 18, 2001. (Order filed 12-4-01.)

Vaspoli filed a notice of intent to submit a summary judgment motion on January 14, 2002. (Notice of Intent filed 1-14-01.) Federal Defendants likewise filed their own notice of intent on January 18, 2002. (Notice of Intent filed 1-18-02.) Both Vaspoli and Jones renewed their motions for summary judgment on February 15, 2002. (Notice of Mot. filed 2-15-02; Notice of Mot. filed 2-15-02.) Federal Defendants filed a motion for summary judgment on February 22, 2002. (Notice of Mot. filed 2-22-02.) Oral argument was heard on all three motions on March 18, 2002.

DISCUSSION

I. Introduction

Moving Defendants have raised the New Jersey Fireman's Rule as a defense. (Mem. in Supp. of Fed. Defs.' Mot. for Summ. J. ("Fed. Defs.' Br") at 28; Vaspoli's Br. in Supp. of Mot. for Summ. J. at 5.) Before addressing this common defense, the Court must consider two issues regarding Plaintiffs' claims against Federal Defendants. Federal Defendants note that, while Plaintiffs properly named the United States as a defendant, they erroneously named the Department of the Navy, an agency of the United States as an additional defendant. (Fed. Defs.' Br. at 21 n.4.) Federal Defendants further indicate that, because the Naval Firefighter Captain was acting within the scope of his federal employment at the time of the fire, he was also

improperly named as a defendant. (Id.) The Court therefore will dismiss Plaintiffs' claims against the Department of the Navy and the Naval Firefighter Captain. As requested by Federal Defendants (Id.), the Court will further dismiss any claims against any other John Doe defendant who was a federal employee. The Court will also dismiss Plaintiffs' FOIA claim in Count Thirteen of the Second Amended Complaint because Plaintiffs apparently admit that they have obtained the information they sought in that claim. (Pls.' Br. at 16.) After consideration of the Fireman's Rule, we then turn to the two additional grounds raised by Federal Defendants: (1) Plaintiffs' failure to exhaust administrative remedies under the FTCA; and (2) the availability of workers' compensation as Mark Roma's exclusive remedy under the special employer doctrine. (Fed. Defs.' Br. at 22-26, 32-38.)

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met that initial burden, the non-moving party must present evidence that establishes that a genuine issue of material fact exists, making it necessary to resolve the difference at trial. Id. at 324; Jersey Cen. Power & Light Co. v. Lacey Township, 772 F.2d 1103,

1109 (3d Cir. 1985). A non-moving party, rather than rely on mere allegations, must present actual evidence that creates a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The role of the judge at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48.

Material facts are only those facts that might affect the outcome of the action under governing law. Id. at 248; Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

III. New Jersey's Fireman's Rule

New Jersey's Fireman's Rule generally protects persons who unintentionally start fires fort tort liability to injured firefighters. See e.g., N.J.S.A. § 2A:62A-21. The rationale behind this rule was best stated by the New

Jersey Supreme Court in Krauth v. Geller, 31 N.J. 270, 157 A.2d 129 (1960):

> Probably most fires are attributable to negligence, and in the final analysis it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences.

Id. at 274, 157 A.2d at 131. The New Jersey Supreme Court held that "[t]he owner or occupier [of a premises] is not liable to a paid fireman for negligence with respect to the creation of a fire." Id. at 273, 157 A.2d at 130.

The Appellate Division of the New Jersey Superior Court extended this rule to volunteer firefighters in Ferraro v. Demetrakis, 167 N.J. Super. 429, 433, 400 A.2d 1227, 1229 (App. Div. 1979). In Ferraro, a volunteer firefighter died due to smoke inhalation. Id. at

431, 400 A.2d at 1228. The firefighter's widow argued that the Fireman's Rule did not apply because her husband was a volunteer firefighter and therefore did not receive financial compensation for his services. Id. at 433, 400 A.2d at 1229. In rejecting this argument the Ferraro court stated:

> The policy behind the rule is to acknowledge the nature of a fireman's duties as determining the scope of risks which he must be deemed to assume. A trained fireman faces the same dangers and must be deemed to assume the same risks whether he is a volunteer or salaried. Moreover, volunteer firemen are expressly covered by the worker's compensation law.

Ferraro, 167 N.J. Super. at 433, 400 A.2d at 1229.

In Rosa v. Dunkin' Donuts of Passaic, 122 N.J. 66, 583 A.2d 1129 (1991) the New Jersey Supreme Court, over a dissent by Justice Handler, ruled that the Fireman's Rule barred an action by a police officer who had suffered

injuries after slipping on powdered sugar at the scene of an emergency. Id. at 66, 583 at 1129. Justice Handler's dissent disagreed with the majority's holding that the Fireman's Rule precluded the recovery of damages for injuries resulting from acts of ordinary negligence that occurred within the course of the public safety officer's duty, even though unrelated to the incident which occasioned the presence of the officer. Rosa, 122 N.J. at 77-86, 583 A.2d at 1134-1140 [Handler, J., dissenting].

Following Justice Handler's criticism of the expansive scope of the rule adopted in Rosa, the New Jersey Legislature amended the Fireman's Rule. The new statute reads:

> In addition to any other right of action or recovery otherwise available under law, whenever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease

> or death while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity, other than that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's employer or co-employee, the law enforcement officer, firefighter, or first aid, emergency, ambulance or rescue squad member suffering that injury or disease, or in the case of death, a representative of that law enforcement officer, firefighter or first aid, emergency, ambulance or rescue squad member's estate, may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.

The amended Fireman's Rule was first applied by the New Jersey Appellate Division in Kelly v. Ely, 336 N.J. Super. 354, 764 A.2d 1031 (2001), certif.. denied, 167 N.J. 635, 772 A.2d 937 (2001). The plaintiff, a volunteer firefighter, tripped over a curb and injured himself while on the scene of a fire. Id. at 356, 764 A.2d at 1032. There was no evidence that the defendant had negligently

maintained the curb. Id. The plaintiff argued that the statute had abrogated the tort immunity historically afforded by the Fireman's Rule and that firefighters were permitted to recover damages upon a showing of ordinary negligence. Id. The Kelly court rejected plaintiff's argument, holding that the new statute's right of recovery was limited to claims that did not relate to the outbreak of the fire occasioning the firefighter's presence. Id. at 360, 764 A.2d at 1034. The Appellate Division stated that the statute allowed for recovery for acts of negligence "unrelated to and independent of, the onset of the fire." Id. at 361, 764 A.2d at 1034-1035. The Kelly court determined that the intention of the amendment was to:

> restore the law to its pre-Rosa state and afford protection to a firefighter injured as a result of negligence unrelated to and independent of, the onset of the fire.

Id. at 361, 764 A.2d at 1034. The Kelly court "consider[ed] it unlikely that the Legislature would have intended to enlarge the scope of a property owner's liability" and reasoned that the plaintiff's interpretation would "ignore the potential consequence of encouraging an owner to delay summoning aid out of fear of incurring liability to a responding firefighter." Id.

Moving Defendants have moved for summary judgment as to the issue of their liability for starting the fire. We hold that Vaspoli, Jones, and the United States are protected by the Fireman's Rule under these circumstances.

A defendant's willful and wanton misconduct is not protected by the Fireman's Rule. Mahoney v. Carus Chem. Co., 102 N.J. 564, 574, 510 A.2d 4, 9 (1986). Wilful and wanton misconduct implicates "an

extraordinary degree of culpability." Entwistle v. Draves, 102 N.J. 559, 561, 510 A.2d 1, 2 (1986). A plaintiff must show that the defendant committed "a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." Id. (citations omitted). The plaintiff must demonstrate that the defendant "consciously and intentionally" committed the injurious act or omission with the awareness that the conduct would "likely or probably result" in injury. Mahoney, 102 N.J. at 574, 510 A.2d at 9 (citations omitted).

The record before this Court does not support Mark Roma's contention that defendants acted in a willful and wanton manner. Rather, the record establishes that all of the parties involved in the daily work and observation of the site in question went to great lengths to ensure that the

job was being done both safely and in accordance with prescribed specifications. Vaspoli, government quality assurance representatives, quality control representatives from Jones, and NAES fire inspectors visited the site on a daily basis. (Ruymann Decl. Ex. 7: Dep. of Keith McDonough dated 9-21-01 ("McDonough Dep.") at 7 & Ex. 6: Dep. of Harry Brown dated 11-13-01 ("Brown Dep.") at 33 & Ex. 8: Dep. of Buck Shimp dated 9-21-01 ("Shimp Dep.") at 10).

A general examination of each defendant's behavior prior to the fire does not support Mark Roma's assertion that any action by a defendant was willful and wanton.

1. Vaspoli

Vaspoli had been working on the site for approximately eight weeks (Vaspoli Dep. at 172), and had used the same

"chop saw" throughout the drainage job (Id.). He had complied with the standard operating procedure in force, and had retained a "hot permit" for the day of the fire from the NAES fire inspector. (Ruymann Decl. Ex. V-10: Hot Work Permit dated 11-24-97.) Vaspoli took precautionary measures, including placing buckets of water on the roof on days when the "chop saw" or other hot tools were being used (Vaspoli Dep. at 49), keeping fire extinguishers on hand (Id. at 29), and stationing a man inside the hangar to watch for falling ashes or smoldering scraps when they were using spark-producing torches. (Id. at 46.) He was unable to detect the existence of debris under any worksite before the removal of the specific roof panels. (Id. at 136-40.) Vaspoli had notified both Jones and federal officials regarding his

findings of debris between the two roofs (Id. at 64-66.), and had been told to proceed with caution. (Brown Dep. at 17.)

2. Jones

As the general contractor, Jones supervised the performance of the drainage work and maintained quality control representatives who visited the site several times a week. (Brown Dep. at 33.) In addition, Vaspoli, as required under its contract, sent daily reports to Jones. (Vaspoli Dep. at 66; Brown Dep. at 35.) Jones was engaged in other projects at NAES, and its employees made frequent visits to the site. (Certif. of Stephen M. Tatonetti, Esq., dated 2-7-02 ("Tatonetti Certif.") Ex. F: Dep. of Charles Sells dated 12-18-01 at 18.) Jones had ordered work on the roof to cease when debris was first discovered in order to await instructions from the NAES

fire inspectors. (Brown Dep. at 17.) After consultation with these fire inspectors, Jones was told to proceed with caution and to document anything encountered between the two roofs in the daily reports. (Id. at 15, 19.) Debris was only encountered three times, including the day of the fire, over a course of eight weeks. (Id. at 15.)

3. The United States

Federal officials also maintained close supervision of the site through fire inspection and quality assurance. (Shimp Dep. at 9-10; McDonough Dep. at 7.) Both fire inspectors and quality assurance representatives visited the site several times a week. (Shimp Dep. at 10; McDonough Dep. at 7.) They also received daily reports from Jones. (Brown Dep. at 35.) Quality assurance representatives and fire inspectors were made aware of the existence of the debris, and they did not perceive its

presence as presenting a significant risk. (McDonough Dep. at 13.) The quality assurance representatives assigned to the job also did not see the use of the chop saw as a fire hazard. (Id. at 22-24.)

Plaintiffs contend that, as Vaspoli, Jones, and the United States knew that debris had been found on two occasions before the fire, they intentionally disregarded a known risk in order to finish the job in a speedy fashion and thereby acted willfully and wantonly. (See, e.g., Pls.' Br. at 22 & 30.) This Court, however, finds that the record presents, at the very best, a case of ordinary negligence. "The bar of the fireman's rule may not be avoided by recasting merely negligent conduct as willful and wanton." Entwistle, 102 N.J. at 561, 510 A.2d at 2. Plaintiffs have failed to satisfy their burden of proving the presence of a genuine issue of material fact as to the

conduct of any defendant. Jersey Cent. Power & Light Co., 772 F.2d at 1109. Accordingly, summary judgment will be granted in favor of Moving Defendants as to Plaintiffs' claims based on alleged liability of Vaspoli, Jones, and the United States for starting or failing to prevent the fire.[6].

IV. Lack of Subject Matter Jurisdiction: The FTCA

A. Administrative Claim Submission Requirement

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued. . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United

[6]. The Court notes that this Fireman's Rule analysis requires the dismissal of not only Mark Roma's claims based on the fire itself but also Melanie Roma's loss of consortium claim in Count Twelve insofar as it is premised on these same grounds of liability.

States v. Sherwood, 312 U.S. 584, 586 (1941); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994)). Congress waived sovereign immunity under certain circumstances in the FTCA, 28 U.S.C. §§ 1346(b), 2671-80. Section 1346(b) gives a district court

> exclusive jurisdiction of civil actions on claims against the United States, for money damages . . for injury of loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b); see also United States v. Muniz, 374 U.S. 150, 152-53 (1963); Deutsch v. United States, 67 F.3d 1080, 1091 (3d Cir. 1995). Cognizable claims under section 1346(b) include those that are:

> (1) against the United States, (2) for money damages, . . . (3) for injury or loss o

> property, . . . (4) caused by the negligent or wrongful act or omission of any employee of the Government (5) while acting within the scope of his office or employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Deutsch, 67 F.3d at 1091 (quoting 28 U.S.C. § 1346(b)); see also Fed. Deposit Ins. Corp., 510 U.S. at 477; Muniz, 374 U.S. at 150.

The FTCA bars a claimant from bringing suit in a district court unless he or she has first exhausted administrative remedies. See 28 U.S.C. § 2675(a); McNeil, 508 U.S. at 111; Deutsch, 67 F.3d at 1091. 28 U.S.C. § 2675(a) specifically provides that:

> [a]n action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The

> failure of an agency to make final disposition of a claim within six months after it is filed, shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

A tort claim against the United States is also time-barred unless a claimant presents the claim in writing to the appropriate federal agency within two years after the claim accrues and files the action in the district court within six months of notice by certified or registered mail of a final decision of the claim by the agency to which it was presented. See 28 U.S.C. § 2401(b); Pascale v. United States, 998 F.2d 186, 190 (3d Cir. 1993).[7] The requirements that a claimant timely present a claim in

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[7] 28 U.S.C. § 2401(b) reads in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

writing for a sum certain are jurisdictional prerequisites to a suit in the district court and cannot be waived. See, e.g., Deutsch, 67 F.3d at 1091; Bilowas v. United States, 443 F.2d 1047, 1049 (3d Cir. 1971).

Federal Defendants argue that, because Melanie Roma never submitted an administrative claim regarding her loss of consortium damages, her claim must be dismissed for lack of jurisdiction. (Fed. Defs.' Br. at 25-26.) In actions under the FTCA, fulfillment of the exhaustion of administrative remedies requirement has long been held to be a prerequisite for subject matter jurisdiction. Deutsch, 67 F.3d at 1091; Bilowas, 443 F.2d at 1049. The spouse of a party seeking recovery under the FTCA must file a separate administrative claim to establish federal jurisdiction. Schwartzman v. Carmen, 995 F. Supp. 574, 576 (E.D. Pa. 1998) (holding that, absent facts

placing agency on notice of both spouses' claims, single claim submitted by one spouse is insufficient to present the claim of other spouse); see also McDevitt v. United States, 963 F. Supp. 482, 485 (E.D. Pa. 1997); Dondero v. United States, 775 F. Supp. 144, 148-49 (D. Del. 1991).

This Court finds that Melanie Roma's loss of consortium claim in Count Twelve of the Second Amended Complaint must be dismissed due to her failure to comply with the FTCA's administrative claim requirement. Deutsch, 67 F.3d at 1091; Bilowas, 443 F.2d at 1049. Plaintiffs assert that a separate administrative claim on Melanie Roma's behalf was never filed because of limited information provided by Federal Defendants as to the extent of their negligence. (Pls. Br. at 39.) However, knowledge as to the extent of Federal Defendants' alleged negligence was not

necessary to file a loss of consortium claim. A person can presumably determine whether he or she has lost the companionship and consortium of a spouse without knowing the extent of the other party's negligence, and this determination can be made within the filing period. In any case, equitable considerations also cannot alter the administrative prerequisites mandated under the FTCA. The Third Circuit stated in Peterson v. United States, 694 F.2d 943 (3d Cir. 1982) that:

> In the Federal Tort Claims Act, Congress waived the sovereign immunity of the United States. However, the injured person must comply with the applicable terms and the conditions prescribed by Congress, including strict observance of the limitations period, which cannot be extended by equitable considerations.

Id. at 944-45. The Court therefore cannot excuse Melanie Roma's failure to comply with the filing requirement

because of her alleged lack of knowledge regarding a consortium claim against Federal Defendants.

Mark Roma's claim that the Federal Defendants were negligent or reckless in starting or failing to prevent the fire must be dismissed due to his failure to file the requisite administrative claim alleging this distinct cause of action. Bilowas, 443 F.2d at 1049. Although Mark Roma filed another administrative claim regarding the same event (SF 95), he also had to file a separate claim for this other cause of action. His filed claim referred only to alleged negligence regarding the instruction to remove his breathing apparatus, and it failed to mention any assertion of alleged wrongdoing in starting or failing to prevent the fire. (Id.) Even if the Fireman's Rule did not apply in these circumstances, any claim by Mark

Roma for negligence in starting the fire must be dismissed for failure to comply with the administrative claim requirements of the FTCA. Peterson, 694 F.2d at 945 n.5; McNeil, 508 U.S. at 111.

V. Special Employment Status

Mark Roma's claim against the United States for negligent or reckless supervision and instruction must be dismissed under New Jersey's special employer doctrine. New Jersey law provides that an employee's exclusive remedy against an employer for ordinary work injuries is a statutory remedy without regard to fault. N.J.S.A. § 34:15-1 et seq.; Gore v. Hepworth, 316 N.J. Super. 234, 240 720 A.2d 350, 353 (App. Div. 1998). In return, the employee forgoes a common-law tort remedy, making the employer immune for any negligence or even

recklessness related to that incident. See N.J.S.A. § 34:15-8;[8] Eger v. E.I. Du Pont DeNemours Co., 110 N.J. 133, 137, 539 A.2d 1213, 1215 (1988); Wilson v. Faull, 27 N.J. 105, 116, 141 A.2d 768, 774 (1958); Gore, 316 N.J. Super. at 240, 720 A.2d at 353; McGovern v. Resorts Int'l Hotel, Inc., 306 N.J. Super. 174, 177-81, 703 A.2d 364, 366-68 (App. Div. 1991). The New Jersey Workers' Compensation Act expressly covers volunteer firefighters. N.J.S.A. § 34:15-43. Mark Roma presently receives $992.00 every two weeks through the Dover Township Board of Fire Commissioners. (Roma Dep. at 180-83.) An employee may have two employers, both of whom may be liable under the workers' compensation

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[8]. New Jersey statutory law provides:

> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

doctrine. See Blessing v. T. Shriver & Co., 94 N.J. Super. 426, 429-30, 228 A.2d 711, 713 (App. Div. 1967). Recovery against one employer bars the employee from maintaining a tort action against the other for the same injury. Id. "'Whether the common law [tort] action is precluded [by the borrowed-employee doctrine] is . . . dependent upon a determination that the borrower of an employee is, in fact, a special employer.'" Gore, 316 N.J. Super. at 240, 720 A.2d at 353 (quoting Volb v. G.E. Capital Corp., 139 N.J. 110, 116, 651 A.2d 1002, 1004-05 (1995)); see also Blessing, 94 N.J. Super. at 434, 228 A.2d at 715 (noting that determination of special-employer relationship is fact-sensitive inquiry).

In determining whether an entity that borrows an employee's services from a general employer is a "special" employer for purposes of workers'

compensation immunity, three factors are considered under New Jersey law: (1) whether the employee has made a contract for hire, express or implied, with the borrowing employer; (2) whether the work being done is essentially that of the borrowing employer; and (3) whether the borrowing employer has the right to control the details of the work. Volb v. G.E. Capital Corp., 139 N.J. at 116, 651 A.2d at 1005. The right to control the borrowed employee's work is the most important factor. Id. Some New Jersey courts also examine two additional factors: (1) whether the borrowing employer pays the employee's wages; and (2) whether the borrowing employer has the power to hire, discharge, or recall the employee. Gore, 316 N.J. Super. at 240-41, 720 A.2d at 354; Kelly v. Geriatric & Med. Servs., 287 N.J. Super. 567, 572, 671 A.2d 631, 633 (App. Div.), aff'd, 147 N.J. 42, 685 A.2d 943 (1996) (per curiam). An employer is

not required to pay the employee's wages and possess to power to hire, discharge, or recall the employee in order to constitute a special employer. Rudenjak v. GPA Nuclear, No. 89-3509, 1991 WL 210852 at *2 (D.N.J. Oct. 11, 1991); see also Volb, 139 N.J. at 116, 651 A.2d at 1005 (stating that New Jersey has adopted three-factor test for determining special-employment relationship). The term "employee" should be construed liberally to bring as many cases as possible within the coverage of the worker's compensation laws. Santos v. Standard Havens, Inc., 225 N.J. Super. 16, 25, 541 A.2d 708, 712 (App. Div. 1988).

Turning to the most important "right to control" factor, Plaintiffs contend that, even though Mark Roma was under the control of NAES personnel while on the scene of the fire, he technically only had to follow the orders of

his own fire company's supervisors and that his supervisors had the option to accept or deny assignments. (Pls.' Br. at 39.) Plaintiffs, however, acknowledge that: (1) his East Dover Volunteer Fire Department supervisor, Chlebowski, accepted NAES's requests for assistance (Roma. Dept. at 82); (2) Chlebowski ordered East Dover firefighters to follow instructions given by NAES personnel (Id.); and (3) Mark Roma did in fact follow the orders given to him by various NAES personnel (Id. at 79-80, 81-82, 87-89, 91, 99; Ruymann Decl. Ex. R-4: Statement of Mark Roma dated 9-14-01). The right of NAES's fire personnel to control Mark Roma's actions is also clearly established by the Mutual Aid Agreement between the East Dover Volunteer Fire Department and

NAES. On September 22, 1983, the Board of Fire Commissioners, District #1, Dover Township[9]. entered into a Mutual Aid Agreement with the Department of the Navy, NAES Lakehurst Fire Department. (Strasser Decl. Ex. 1: Mutual Aid Agreement at 2). Paragraph (6) of that agreement states that in the event that mutual aid is rendered:

> The senior officer of the fire department of the requesting service shall assume full charge of the operations. However, under procedures agreed to by the technical heads of the fire departments involved, a senior officer of the department furnishing the assistance may assume responsibility for the coordination of the overall operation.

(Id.) The record fails to suggest that Chlebowski or any other East Dover firefighter assumed responsibility for the coordination of the hangar fire or that the requisite

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[9]. The Board of Fire Commissioners, District #1, Dover Township includes four fire companies: Toms River Volunteer Fire Co #1, Toms River Volunteer Fire Co #2, Ocean Beach Volunteer Fire Co., and the East Dover Volunteer Fire Co. (Strasser Decl., ¶2.)

procedures for any such assumption even existed at the time of the fire. The Mutual Aid Agreement and the actual occurrences on the day of the fire therefore establish that NAES fire personnel directed and oversaw Mark Roma.

The test for whether an implied contract of hire exists is whether "the employee consents to the special employment relationship ... [and] voluntarily submit[s] to the employer's direction and control. Antheunisse v. Tiffany & Co., 229 N.J. Super. 399, 403, 551 A.2d 1006, 1008 (App. Div. 1988) (citations omitted). Plaintiffs contend that the Mutual Aid Agreement does not constitute an express or implied contract because Mark Roma is not a direct party. (Pls.' Br. at 39.) The existence of an express or implied contract, however, can be proven without relying on the Mutual Aid Agreement.

Upon arrival to the NAES, Mark Roma's fire company parked its truck outside Station 63, and Chlebowski was debriefed by NAES fire personnel. (Roma Dep. at 76.) Chlebowski, following the instructions of NAES personnel, ordered three of his firefighters, including Mark Roma, to report to the NAES captain. (Id. at 77.) Mark Roma followed Chlebowski's command and reported to the NAES captain's position, wherein he received the first of several NAES orders. (Id.) By accepting Chlebowski's order to report to and follow the direction of the NAES captain, Mark Roma consented to work under the control of the NAES officers. He thus satisfied both prongs of the test: (1) he consented to the special-employment relationship; and (2) he voluntarily submitted to the borrowing employer's control.

Accordingly, Mark Roma's actions established an implied contract of employment.

The final mandatory factor under the Volb test is that the work being performed is essentially that of the borrowing employer. In evaluating that factor, New Jersey law looks to: (1) whether there is substantial economic dependence on the putative employer;[10] and (2) whether there is a functional integration of the employee's work and the borrowing employer's work. Santos, 225 N.J. Super. at 23, 541 A.2d at 711. A special employment relationship exists if the work done by the borrowed employee "was an integral part of the regular business" of the borrowing employer. Rossnagle v. Capra & Shell Oil Co., 127 N.J. Super. 507, 517, 318

[10]. Because Mark Roma is a volunteer firefighter who does not receive compensation for his services, this element is not applicable in this context.

A.2d 25, 30 (App. Div. 1973), aff'd, 64 N.J. 549, 318 A.2d 20 (1974) (per curiam) Clearly, fighting a fire on the NAES base is an "integral part of the regular business" of the NAES firefighters. Mark Roma's participation in fighting the hangar fire can also been seen as involving the integration of his work and the work of the NAES fire personnel. Santos, 225 N.J. Super. at 23, 541 A.2d at 711.

In opposing the motion for summary judgment, plaintiff maintains that a special employer relationship cannot be established because of the two additional factors regarding payment of wages and the power to hire, discharge, or recall. (Pls.' Br. at 31-41.) As the Court previously noted, satisfaction of the last two factors is not required to find that an employer is a special employer. Rudenjak, 1991 WL 210852 at *2; see also Volb, 139

N.J. at 116, 651 A.2d at 1004. Accordingly, the record establishes that Mark Roma was a special employee of the United States. Due to the existence of the special employer relationship, Mark Roma is barred from suing the United States for negligent or reckless supervision and instructions, and his claims based on such a theory of liability will be dismissed with prejudice.

CONCLUSION

Plaintiffs have been unable to establish the existence of any issues of genuine fact regarding the three distinct summary judgment motions before this Court. Plaintiffs' claims against the Department of the Navy, the Naval Firefighter Captain, and any other John Doe defendants who were federal employees must be dismissed. The Court likewise must dismiss Plaintiffs' FOIA claim because they have already obtained the requested

information. The Fireman's Rule bars Plaintiffs' claims for starting or failing to prevent the fire against Vaspoli, Jones, and the United States. The FTCA's administrative filing requirements and the existence of a special employer relationship mandate the dismissal of the remaining claims against the United States. Accordingly, the defendants are entitled to summary judgment as a matter of law, and the Court will dismiss with prejudice all counts in the Second Amended Complaint against the United States, the Department of the Navy, the Naval Firefighter Captain, Vaspoli, Jones, and any John Doe defendant who was a federal employee.

IT IS THEREFORE on this 5th day of September, 2002, **ORDERED** that the motion of defendants the United States of America, the United States Department of the Navy, and Naval Firefighter Captain John Doe for summary judgment (no. 49-1 on the docket; 43-1 notice of intent) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that the motion of defendant Vaspoli Custom Builders, Inc. t/a Vaspoli Custom Builders for summary judgment (no. 44-1 on the docket; no. 42-1 notice of intent) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that the motion of defendant J.A. Jones Management Services t/a Jones Management Services for summary judgment (no. 45-1 on the docket) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that all claims in the Second Amended Complaint of plaintiffs Mark Roma and Melanie Roma against the United States of American, the United States Department of the Navy, Naval Firefighter Captain John Doe, Vaspoli Custom Builders, Inc. t/a Vaspoli Custom Builders, J.A. Jones Management Services t/a Jones Management Services, and any John Doe defendant who was a federal employee be and hereby are **DISMISSED WITH PREJUDICE;** and

IT IS FURTHER ORDERED that the parties shall **SHOW CAUSE** on October 7, 2002, why any remaining claims in the first-party action, claims in the third-party actions, and cross claims should not be dismissed in their entirety as moot, thereby closing this case; and

IT IS FURTHER ORDERED that the parties observe the following briefing schedule:

September 18, 2002	Plaintiffs' Response to the Order to Show Cause
September 27, 2002	Responses to the Order to Show Cause on behalf of all other parties
October 4, 2002	Reply papers from any party; and

IT IS FURTHER ORDERED that the Order to Show Cause will be decided on the papers without oral argument pursuant to Federal Rule of Civil Procedure 78 unless otherwise directed by the Court prior to the return date.

./s/ Mary L. Cooper

Mary L. Cooper

United States District Judge